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No. 77-1763

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES SUTTON, JR., and CECIL HUMPHRIES,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that a superseding indictment filed against them prior to trial was the product of prosecutorial vindictiveness and deprived them of due process.

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioners were each convicted of conspiracy to falsify material facts concerning the source of mar-

keted tobacco, a matter within the jurisdiction of the United States Department of Agriculture, in violation of 18 U.S.C. 371. In addition, petitioner Sutton was convicted on ten counts, and petitioner Humphries on six counts, of falsifying material facts, in violation of 18 U.S.C. 1001. Petitioner Sutton was sentenced to concurrent terms of 21 months' imprisonment, and petitioner Humphries was sentenced to concurrent terms of 18 months' imprisonment.[1] The court of appeals affirmed *per curiam* (Pet. App. 1a-2a).

In brief, the evidence at trial showed that in October and November 1973 petitioners engaged in a scheme to market over 25,000 pounds of tobacco the source of which was falsely identified by use of Department of Agriculture quota cards that had been issued to farmers to designate tobacco grown on the property of those farmers. Most of the tobacco was marketed at the Big Yadkin Warehouse in North Carolina, owned and operated by petitioner Humphries and managed by petitioner Sutton.

The original indictment was filed on September 7, 1976 (C.A. App. a1-a14). It named petitioners and seven others as defendants. Petitioner Sutton was charged with nine substantive offenses and with nine separate conspiracies; each conspiracy charged an agreement to commit one of the substantive offenses.

[1] Co-defendant Herbert T. Highsmith was tried together with petitioners and was also convicted of conspiracy, in violation of 18 U.S.C. 371, and of falsifying material facts, in violation of 18 U.S.C. 1001 (C.A. App. a49-a50) ("C.A. App." refers to the joint appendix in the court of appeals). Highsmith died while the case was pending on appeal.

Petitioner Humphries was charged with two substantive offenses (*ibid.*).

At their arraignment on October 8, 1976, both petitioners pleaded not guilty. Thereafter, they moved pursuant to Rule 14, Fed. R. Crim. P., for separate trials for each defendant and for separate trials for certain of the counts contained in the indictment against each defendant. The district court granted the motion, ruling that petitioners' cases should be severed for trial and that petitioner Sutton should be given four separate trials on the various counts of the indictment (C.A. App. a15-a16). The prosecutor, who had not been personally involved in drafting the original indictment, indicated that he expected six of petitioners' co-defendants to plead guilty and that the government might subsequently elect to go to trial on only some of the counts in order "to make things somewhat simpler for all parties involved" (*id.* at a15-a17).

On November 8 and 9, 1976, the remaining co-defendants pleaded guilty (Gov't. Br. 4). Thereafter, on December 6, 1976, a superseding indictment was filed, charging petitioners jointly with one count of conspiracy and with eleven substantive violations (C.A. App. a19-a32).[2] The government, which had

[2] The second indictment differed in certain respects from the original. Petitioners and co-defendant Highsmith were joined as defendants in each count of the superseding indictment; in the first indictment, on the other hand, all of the defendants, including those who later pleaded guilty, were variously charged in different combinations. Moreover, the conspiracy alleged in the superseding indictment was sub-

previously offered to accept petitioner's guilty plea to one count of the first indictment, kept its offer open until the commencement of trial (Gov't. Br. 29).

Petitioners contend (Pet. 5-9) that the government's action in filing a superseding indictment—after petitioners had pleaded not guilty and had successfully moved for a severance—created "a realistic likelihood of [prosecutorial] 'vindictiveness'" (*Blackledge* v. *Perry*, 417 U.S. 21, 27) that deprived petitioners of due process.[a] Assuming that *Blackledge* has relevance in a case such as this where the superseding indictment served to clarify the charges in the original indictment without altering the basic nature of those charges, the circumstances of this case negate any inference of government vindictiveness, as the court below properly found (Pet. App. 2a).

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stantially different from any offense charged in the initial indictment (compare the conspiracy counts of the first indictment with count one of the second indictment [C.A. App. a19-a24]). The substantive counts in the superseding indictment relate to the same events charged in the first indictment, but count eight, which replaced former count twelve, corrected a defective allegation concerning the manner in which the tobacco was falsely identified on one particular occasion.

[a] Petitioners failed to move for dismissal of the superseding indictment on this theory in the district court. We submit that they are precluded from raising this issue in this Court as a consequence of their failure to raise it in timely fashion in the district court. See Rule 12(f), Fed. R. Crim. P. Because of this failure by petitioners, the government was prevented from making a factual record in the district court that would disprove the theory of "vindictiveness" with greater clarity. Accordingly, we rely in part upon the representations contained in the government's brief in the court of appeals. See *United States* v. *Lovasco*, 431 U.S. 783, 786-787.

Here, unlike *Blackledge*, after the original indictment had been obtained the government discovered new evidence that showed that petitioner Humphries and co-defendant Highsmith were more deeply involved in certain aspects of the criminal scheme than originally believed. This new evidence consisted primarily of the testimony of the co-defendants who had pleaded guilty (Gov't. Br. 28-29). Furthermore, an additional witness, Carl Thomas Brock, also indicated a willingness to testify against petitioners in support of the new allegations contained in the superseding indictment (Gov't. Br. 29). This new evidence—not prosecutorial vindictiveness—prompted the superseding indictment.

Moreover, the prosecutor who obtained the superseding indictment had not been responsible for the drafting of the original indictment. His review of the file in this case convinced him that one of the substantive counts had been incorrectly drafted and that the nine separate conspiracy counts alleged different aspects of a single, unified conspiracy. The superseding indictment was thus warranted to correct a plain error in the original indictment and to clarify the conspiracy charge (Gov't. Br. 28).

It is also significant that the superseding indictment did not charge any new or more serious crimes than had originally been alleged. Indeed, while petitioners were charged with additional substantive counts in the superseding indictment and petitioner Humphries was charged, for the first time, with conspiracy, the government dropped eight conspiracy counts against

petitioner Sutton. That the government *reduced* the number of charges against one of the petitioners confirms that it was not seeking to punish petitioners for having asserted their rights.

The conclusion that the government did not secure the superseding indictment for retaliatory purposes is buttressed by the fact that the government did not object to petitioners' motion for severance of the original charges, and in fact conceded that those charges had to be severed, at least to some extent, for trial (C.A. App. a15). Moreover, as the court of appeals pointed out (Pet. App. 2a), "the government's offer to accept a plea to a single count of the original indictment was renewed and kept open to the date of trial on the superseding indictment." Thus, because the government did not oppose petitioners' assertion of their rights and held open its original plea offer, it is not plausible to contend that the second indictment was the product of vindictiveness. See *United States* v. *Thurnhuber*, 572 F.2d 1307, 1310-1311 (C.A. 9).

Blackledge, *supra*, is inapposite on these facts. The Court there held that due process was denied when the state responded to the defendant's assertion of his right to a trial *de novo* by filing more serious charges, since a defendant is entitled to exercise his procedural rights without fear of prosecutorial vindictiveness. In this case, however, the prosecutor's action in bringing the superseding indictment was unrelated to the exercise of petitioners' procedural rights, and, accordingly, there is no "danger that the

[government] might [have] be[en] retaliating against the accused."[4] *Bordenkircher* v. *Hayes*, No. 76-1334, decided January 18, 1978, slip op. 6. See *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n. 7; *United States* v. *Nell*, 570 F.2d 1251, 1254-1255 (C.A. 5); *United States* v. *Ricard*, 563 F.2d 45, 46-48 (C.A. 2), certiorari denied, No. 77-5852, March 6, 1978; *United States* v. *Partyka*, 561 F.2d 118, 124 (C.A. 8), certiorari denied, No. 77-5461, January 16, 1978.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

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[4] Although prosecutorial vindictiveness may present a realistic danger in cases where a defendant successfully appeals a conviction or demands a second trial *de novo*, a routine motion to sever charges of the kind here involved does not present a comparable danger of retaliatory action.

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